No. 09-889

IN THE

Supreme Court of the United States

DANIEL M. ZACHEM,

Petitioner,

v.

PETER JAMES ATHERTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT

This case involves the involuntary dismissal of a sitting grand juror by a jury officer of the District of Columbia Superior Court, contrary to court rules and under an unwritten, idiosyncratic local practice that has since been prohibited. The issue is whether a supervisory prosecutor who participated in the improper dismissal and who was not involved in the presentation of evidence to the grand jury is entitled to absolute immunity from a *Bivens* suit by the unlawfully dismissed grand juror.

Peter James Atherton, a Washington, D.C., resident with degrees in electrical and nuclear engineering, was sworn in as a member of a District of Columbia Superior Court grand jury on April 9, 2001, for a term of 25 days. *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 678 (D.C. Cir. 2009); Pet. App. 5a. The grand jurors were given a jury instruction book identifying crimes and their elements. *Id.*; Pet. App. 7a. As prosecutors presented evidence to the grand jury to obtain indictments, Atherton became concerned that some of the crimes for which indictments were being sought were not identified in the instruction book. *Id.*; Pet. App. 5a. With the foreman's concurrence, Atherton obtained additional information on those crimes and their elements from the prosecutors. *Id.*; Pet. App. 61a. Atherton also questioned some of the witnesses to satisfy himself that there was sufficient credible evidence to justify an indictment. *Id.* at 679; Pet. App. 7a.

Atherton's requests for additional information and his questioning of witnesses caused some delay in the grand jury deliberations and some of the grand jury members became upset.[1] One day later, on April 10, 2001, a supervising prosecutor was summoned by the grand jury, listened to their complaints and "counseled patience and collegiality."[2]

The following day, a different supervising prosecutor, Petitioner Daniel M. Zachem, was contacted by the prosecutor presenting evidence to the grand jury and was told that a particular grand juror, was "frustrating his colleagues" by his meticulous approach to grand jury service. *Atherton*, 567 F.3d at 678-79; Pet. App. 7a. Later that same day, Zachem was summoned to the grand jury room in his capacity as a supervisor. *Id.* at 679; Pet. App. 7a. There, several grand jurors "expressed the view that [Atherton] was frustrating the grand jury's ability to conduct business." *Id.*; Pet. App. 7a-8a. Zachem then contacted the Superior Court Director of Special Operations, Roy Wynn, who directed him to the jury officer, Susanne Bailey-Jones. *Id.* at 676,

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[1] "Some jurors seemed upset because they had voted to indict without knowledge of the elements and a new vote would be needed once the elements of the charge were known." *Id.* at 678 (internal quotations omitted); Pet. App. 5a (internal quotations and citation omitted).

[2] Zachem's Email to Bailey-Jones, Pet. App. 73a. Both the petition and the D.C. Circuit rely heavily on Zachem's email to Bailey-Jones written on April 12, 2001, the day after Atherton's dismissal. Because there has been no discovery, the veracity of Zachem's after-the-fact, self-serving version of the events related in the email has, of course, never been tested.

679; Pet. App. 8a. After discussing the matter with Bailey-Jones, Zachem returned to the grand jury room, confiscated Atherton's notes, and told Atherton to report to Wynn "immediately." *Id.* at 678; Pet. App. 7a. Atherton was directed to Bailey-Jones, who summarily and permanently dismissed him from the grand jury. *Id.* at 678; Pet. App. 6a. Atherton "was never permitted the opportunity to defend himself" and was given no "reasons for his dismissal." *Id.*; Pet. App. 6a.

The rules of the Superior Court in effect at the time provided:

> (g) Discharge and excuse. . . . At any time for cause shown, *the Chief Judge or other judge designated by the Chief Judge* may excuse a juror either temporarily or permanently, and in the latter event, the Chief Judge or designee may impanel another person in place of the juror excused.

Id. at 679; Pet. App. 9a (quoting D.C. SUP. CT. R. CRIM. P. 6(g) (emphasis added)).

Despite the clear language of the Rule, Chief Judge Rufus G. King III stated in an affidavit that he "was never contacted by anyone from the Court's jury office or the U.S. Attorney's office before or at the time of the removal of grand juror Atherton." *Id.*(internal quotation marks and citation omitted); Pet. App. 9a. King, who had been appointed as Chief Judge only recently, explained that at the time "there were no formal procedures in place . . . for disciplining jurors" and that "[t]he practice then in place did not include contacting the chief judge before a grand juror was involuntarily dismissed." *Id.*

(internal quotation marks and citation omitted); Pet. App. 9a. The Chief Judge further stated that he "changed the procedures to require that [he] be consulted before imposition of any grand jury discipline." *Id.* (internal quotation marks and citation omitted).

In April 2004, proceeding *pro se*, Atherton filed this suit against several city and federal officials, including Bailey-Jones and Zachem, asserting due process and equal protection claims pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Atherton*, 567 F.3d at 680; Pet. App. 10a. Atherton alleged tha t he was unlawfully removed from grand jury service because of, among other things, his "meticulous nature, [and] thoroughness of deliberation."[3] *Id.* (quoting Complaint ¶ 68); Pet. App. 69a. The district court granted the defendants' motion to dismiss, holding, *inter alia*, that both Bailey-Jones and Zachem were entitled to absolute immunity. *Atherton v. D.C. Office of the Mayor*, No. 04-0680, at 12, 2007 WL 1041659 (D.D.C. Apr. 5, 2007); Pet. App. 40a.

In June 2009, the D.C. Circuit reversed the dismissal of Atherton's due process claims against Bailey-Jones and Zachem, holding that neither was

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[3] The district court initially dismissed the action *sua sponte* for lack of subject matter jurisdiction, but this was summarily reversed by the D.C. Circuit and the case remanded. *Id.* (citing *Atherton v. D.C. Office of the Mayor*, No. 04-5268 (D.C. Cir. June 21, 2005)).

entitled to absolute immunity.[4] It affirmed the dismissal of all remaining claims.[5] *Id.*; Pet. App. 4a.

Applying this Court's "functional approach" to the prosecutorial immunity issue, the D.C. Circuit concluded that Zachem's participation in Atherton's removal from the grand jury was neither "intimately associated with the judicial phase of the criminal process", nor did it "occur in the course of his role as an advocate for the State" so as to be shielded by absolute immunity. *Id.* at 686 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997); Pet. App. 26a. It found that Zachem's conduct was also not comparable "to any of the advocative functions for which prosecutors traditionally have been protected by absolute immunity," such as deciding whether to initiate a prosecution, participating in a probable cause hearing, presenting the state's case at trial, or evaluating which evidence to present to the grand jury. *Id.* (citing *Imbler*, 424 U.S. at 409, *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Kalina*, 522 U.S. at 118); Pet. App. 26a.

The court meticulously analyzed this Court's most recent decision on prosecutorial immunity, *Van de*

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[4] *Atherton*, 567 F.3d at 677 (Kavanaugh, Edwards, and Williams, J.J.); Pet. App. 4a. Atherton's *pro se* petition for certiorari from the Court of Appeals' dismissal of his claims against the other defendants was denied by this Court on March 29, 2010. *Atherton v. D.C. Office of the Mayor*, No. 09-8739.

[5] The panel included two former prosecutors, Circuit Judges Williams and Kavanaugh.

Kamp v. Goldstein, 129 S. Ct. 855 (2009), which addressed the issue of "how immunity applies where a prosecutor is engaged in certain administrative activities." *Id.* at 861; Pet. App. 27a-28a. In *Van De Kamp*, this Court drew a sharp distinction between the "kind of administrative obligation . . . that itself is directly connected with the conduct of a trial," *id.* at 862, such as the training and supervision of trial prosecutors, which it concluded is entitled to absolute immunity, and other kinds of administrative activities, which are not. *Id.* Because Zachem's participation in Atherton's removal from the grand jury "had nothing to do with a prosecutor's preparation for or participation in a criminal trial," *Atherton*, 567 F.3d at 687, the D.C. Circuit concluded that *Van de Kamp* taught that Zachem was not entitled to absolute immunity. *Id.*; Pet. App. 28a. Finally, the court concluded that the *Imbler* factors also counseled against absolute immunity. *Id.*; Pet. App. 28a-29a.

The Court of Appeals noted that there remained an issue as to whether either Bailey-Jones or Zachem was nevertheless entitled to qualified immunity. *Id.* at 689; Pet. App. 32a. Because this was "a challenging question" that had not been addressed by the district court and had been "only thinly briefed on appeal," the Court of Appeals concluded that it was "not in a position to address the questions that remain to be answered here." *Id.* at 689-91; Pet. App. 36a-38a. It accordingly remanded the case to the district court to consider the qualified immunity issue and the other issues identified in its opinion. *Id.* at 691; Pet. App. 39a.

Zachem filed a petition for rehearing *en banc*, which was denied when no judge called for a vote. Pet. App. 56a. He sought certiorari from this Court. Atherton's time to file a brief in opposition was extended from February 25, 2010, to April 12, 2010. Jury officer Bailey-Jones did not file a petition for a writ of certiorari with this Court. Because the mandate of the Court of Appeals has issued and has not been stayed, both Bailey-Jones and Zachem are presently before the district court on remand for a determination of the qualified immunity issue. The district court has scheduled a status conference for June 18, 2010.

REASONS FOR DENYING THE PETITION

The petition raises no issue that warrants consideration by this Court. It involves only the unique question of whether, on the eccentric facts of this case, absolute immunity should be extended to a supervisory prosecutor's participation in the unauthorized removal of a sitting grand juror by a Superior Court jury officer acting pursuant to an unwritten local practice that has since been halted. There is no conflict among the Courts of Appeals on this issue, and there is no showing that the type of prosecutorial conduct involved here is common (or even rarely recurring). At bottom, it involves only the application of well-established legal principles governing absolute prosecutorial immunity to the facts of this particular case. The court below engaged in a thoughtful analysis of this Court's decisions concerning absolute immunity, including last Term's decision in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), and its conclusion that absolute immunity is not justified in this case is in full accord with the

principles established by this Court. Nothing in that factbound determination warrants further review in this Court.

I. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER CIRCUIT COURTS' DECISIONS

In search of a certworthy issue, Zachem first contends that the decision below creates a circuit split, but that is not the case.[6] He cites two cases in support of his claimed conflict: *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047 (8th Cir. 1992), involving a claim for defamation based on statements in a grand jury's report that prosecutors helped to draft; and *Fields v. Soloff*, 920 F.2d 1114 (2d Cir. 1990), in which prosecutors carried out a judge's order to confiscate unauthorized materials distributed to grand jurors. Neither bears any resemblance to this case; indeed, they are so different that, far from presenting any conflict, they emphasize the unique circumstances presented here. In both *DeCamp* and *Fields* state prosecutors were carrying out their assigned duties under state law. Neither case involves the claim of a grand juror unlawfully dismissed for diligently performing his sworn duties, at the instance of a prosecutor not otherwise involved in presenting evidence to the grand jury.

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[6] Zachem did not raise any supposed conflict with other circuits in his petition for rehearing and rehearing *en banc*, so the D.C. Circuit did not have the opportunity to address this argument. Had it been presented, it would have been disposed of quickly.

The petition claims that the Second and Eighth Circuits held that "a supervisory prosecutor who does not actively present evidence to a grand jury may still be entitled to absolute immunity." Pet. 10. It is true that a supervisory prosecutor who does not actively present evidence to a grand jury may be entitled to absolute immunity under appropriate circumstances. It is also true that a supervisory prosecutor who does not actively present evidence to a grand jury may *not* be entitled to absolute immunity, under appropriate circumstances. As this Court's cases teach, it is the prosecutor's *function* that is crucial, and the functions of the prosecutors in *DeCamp* and *Fields* are in stark contrast to the function performed by Zachem here.

In both *DeCamp* and *Fields*, prosecutors were acting in a manner authorized by state law, and in direct support of a proper function of a judge or a grand jury, who themselves enjoyed absolute immunity, and the courts concluded that it would be anomalous to grant lesser immunity to the prosecutor. Here, Zachem acted together with a jury officer who has been determined *not* to enjoy absolute immunity, and it would have been anomalous for the D.C. Circuit to hold differently.[7] Petitioner does not, and cannot, cite any case

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[7] One very broad principle implicated in *DeCamp* and *Fields* is avoiding the anomaly of giving the prosecutor different immunity from the organ (judge or grand jury) in whose support he or she operates. On that very general level, the decision below is consistent with *DeCamp* and *Fields*, with which Zachem's desired result would conflict.

remotely resembling this one, let alone conflicting with it.

A. The D.C. Circuit's Decision Does Not Conflict with the Eighth Circuit's Decision in *DeCamp*

In *DeCamp*, prosecuting attorneys helped a grand jury prepare an official report setting forth the results of its investigation into possible criminal activity by influential members of the community. 978 F.2d at 1049. Under Nebraska law, prosecutors had a duty to give legal advice to the grand jury "in any legal matter." *Id.* (quoting NEB. REV. STAT. § 29-1408). The grand jury report contained allegedly defamatory statements about an attorney who was neither the target of the grand jury investigation, nor a witness before it. *Id.* That attorney brought a 42 U.S.C. § 1983 action against the grand jurors and prosecutors for violating his constitutional rights to due process and free speech. *Id.*

The Eighth Circuit first held unanimously that the grand jurors were entitled to absolute immunity for their issuance of the report. *Id.* at 1050-51. The majority then held that the prosecutors were entitled to absolute immunity for co-authoring the report. *Id.* at 1054. The court upheld the district court's finding that the prosecutors' assistance in drafting the report fell under their statutory duty imposed by Nebraska law to serve as the grand jury's legal advisors. *Id.* at 1053. Applying the functional approach, the majority concluded that in advising the grand jury, the prosecutors were helping it to perform its quasi-judicial functions, and, as such, they were put "in the midst of an activity 'intimately associated with the judicial phase of the criminal

process.'" *Id.* at 1054 (quoting *Imbler*, 424 U.S. at 430).

DeCamp, therefore, is wholly different from this case for several reasons. First, it turned on the fact that the function at issue (helping the grand jury to prepare its report) constituted the proper provision of legal advice within the meaning of a state statute. Here, no statute or rule authorized Zachem to procure the dismissal of a grand juror. To the contrary, as the petition concedes, Pet. 19-20, only the Chief Judge or another judge designated by the Chief Judge had the authority to dismiss a grand juror.

Second, the prosecutors were engaged in the traditional prosecutorial function of assisting the grand jury determine whether to return an indictment and to prepare a report explaining its decision not to indict. The function of the prosecutors in *DeCamp*, therefore, was unquestionably "intimately associated with the judicial phase of the criminal process," as the Eighth Circuit found. *DeCamp*, 978 F.2d at 1054. Here, Zachem's conduct had nothing to do with the judicial phase of the criminal process. Instead, Zachem became involved in an internal conflict among members of the grand jury. His action in procuring Atherton's removal was an administrative act unrelated to any proper judicial or prosecutorial function.

In sum, *DeCamp* had a different outcome on the basis of very different facts, and with respect to general principles of prosecutorial immunity, the decision of the Eighth Circuit is in harmony with that of the D.C. Circuit.

B. The D.C. Circuit's Decision Does Not Conflict with the Second Circuit's Decision in *Fields*

Nor does the decision below create a conflict with the Second Circuit's decision in *Fields*. The plaintiff in *Fields*, while serving on a state grand jury, tried to initiate a criminal proceeding against one of the prosecutors. 920 F.2d at 1116. The grand juror requested the supervising prosecutor's permission to present materials regarding the subject of his own investigation. *Id.* The request was denied. *Id.* The supervising judge later issued an order prohibiting that juror from communicating with his fellow grand jurors about anything other than what was brought to their attention by the prosecutors. *Id.* When the grand juror disregarded that order and distributed unauthorized materials to the other grand jurors, the judge directed two prosecutors to confiscate those materials. *Id.* The grand juror's subsequent 42 U.S.C. § 1983 action against the judge and the two prosecutors was dismissed on absolute immunity grounds. *Id.* at 1116-17.

Fields, like *DeCamp*, is utterly unlike this case, and does not conflict with this case on an issue of law. First, it does not deal with the dismissal of a grand juror (and the Petition cites no case that does). Second, the court in *Fields* determined that advising the grand jury of the judge's orders and overseeing the confiscation of unauthorized materials pursuant to the judge's directions were part of the prosecutors' duties under New York state law, *id.* at 1120 (citing N.Y. CRIM. P. LAW §§ 190.25(6), 190.50(2)), whereas here, Zachem's action violated the applicable court rule.

More importantly, the Second Circuit in *Fields* applied the required functional analysis and held that carrying out the judge's orders was a function so "intimately associated with the judicial phase of the criminal process," that the prosecutors were entitled to absolute immunity. *Id.* at 1120 (quoting *Imbler*, 424 U.S. at 430). The court found that the conduct of the prosecutors was much like a prosecutor's conduct in securing an indictment or proving guilt at trial. *Id.* The prosecutors' confiscation of materials that one of the grand jurors sought to circulate was, therefore, analogous to their role in determining which evidence the grand jury should, or should not, consider and directly involved the presentation of evidence to the grand jury, a core prosecutorial function traditionally protected by absolute immunity. By contrast, Zachem's conduct had nothing to do with deciding what evidence the grand jury should consider. Rather, Zachem decided *which* grand jurors could consider whatever was presented, which had nothing to do with any core, or even peripheral, prosecutorial function traditionally protected by absolute immunity. Indeed, the District of Columbia conceded in the Court of Appeals that the dismissal of a grand juror was an administrative function. *Atherton*, 567 F.3d at 684; Pet. App. 20a.

Because the functions undertaken by the prosecutors in *Fields* were prosecutorial while the function undertaken by Zachem was administrative, there is no conflict between the two decisions.

II. THIS CASE'S UNUSUAL FACTS MAKE IT A POOR VEHICLE TO DEVELOP THE LAW OF ABSOLUTE PROSECUTORIAL IMMUNITY

Zachem argues that his is an exceptionally important case that warrants this Court's review, claiming that it will have broad-reaching impact and "will likely influence the conduct of every prosecutor in the United States with involvement before grand juries." Pet. 26. In fact, this case is apparently unique, arising out of an errant practice in the D.C. Superior Court, which has since been corrected. No similar case has been identified, and the juror dismissal situation giving rise to this case is unlikely to recur.

Nothing about this case suggests that it will expose prosecutors to vexatious litigation. Given the unusual nature of this case, Zachem's contention that the D.C. Circuit's decision represents a significant "erosion" of absolute immunity for prosecutors, Pet. 26, is hardly persuasive. The D.C. Circuit's decision is narrow in scope, applying this Court's settled law to these unique factual circumstances. The case has literally nothing to do with a prosecutor's usual grand jury duties of presenting evidence and providing legal advice to grand juries.

Most prosecutorial immunity cases arise in the context of a criminal defendant suing a prosecutor. *See Van de Kamp*, 129 S. Ct. at 860 (citing *Imbler* 424 U.S. at 425). Indeed, all of this Court's decisions involving prosecutorial immunity dating back to

Imbler appear to address this situation.[8] The analysis in this Court's prosecutorial-immunity jurisprudence is rooted in the notion that a contemporary 42 U.S.C. § 1983 action against a prosecutor is analogous to a common-law action for malicious prosecution. Citizens excused or dismissed from grand jury service are very different from those prosecuted or convicted of crimes. The petition has pointed to no other case where a grand juror has sued a prosecutor for wrongful removal from a grand jury and our research has disclosed none. The absence of cases involving grand jurors suing prosecutors for involuntary dismissal should counsel against the grant of certiorari. And this case can hardly be characterized as frivolous or vexatious, as attested to by the D.C. Circuit's decision and the fact that the Chief Judge of the Superior Court took action to prevent this circumstance from arising again.

Nor, for that matter, would the situation of the unlawfully dismissed grand juror implicate the general concerns underlying prosecutorial immunity.

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[8] *E.g.*, *Van de Kamp*, 129 S. Ct. at 862-65 (addressing claims by a criminal defendant against a prosecutor for his failure to properly supervise and train subordinates); *Kalina*, 522 U.S. 118 (addressing claims by a criminal defendant against a prosecutor for making false statements in an affidavit); *Buckley*, 509 U.S. 259 (addressing claims by a criminal defendant against a prosecutor for fabricating evidence and making false statements); *Burns*, 500 U.S. 478 (addressing claims by a criminal defendant against a prosecutor for his participation in probable cause hearing and for his legal advice to the police); *Imbler*, 424 U.S. 409 (addressing claims by a criminal defendant against a prosecutor for knowingly using false evidence and suppressing material evidence).

It is one thing to be concerned that if prosecutors were not protected from legal liability for their *prosecutorial advocacy*, that might generate timidity where fearlessness is desired. The same concern cannot be said to apply to a prosecutor's *removing uncooperative grand jurors* without intervention of a judge, where similar concerns of fearlessness and timidity do not apply.[9]

Not only do the unusual facts of the case counsel against granting certiorari, the clarity of the procedural rules governing removal of grand jurors all over the country also counsels against it, because they make it unlikely that a similar claim will arise again.

When Atherton was wrongfully removed from the grand jury, the D.C. Superior Court Rules were clear as to what procedure should have been followed:

> A grand jury ordered by the Superior Court shall serve until discharged by the Chief Judge or other judge designated by the Chief Judge . . . . At any time for cause shown, the Chief Judge or other judge designated by the Chief Judge may excuse a juror either temporarily or permanently, and in the latter

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[9] To the contrary, prosecutors should have no power to remove grand jurors, because the historic and essential role of the grand jury is precisely to be a check on the overzealous prosecutor. *See United States v. Mandujano*, 425 U.S. 564, 571 (1976) ("Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.")

> event the Chief Judge or designee may impanel another person in place of the juror excused.

D.C. SUP. CT. R. CRIM. P. 6(g).

Atherton's dismissal by a jury officer violated that rule and was based on an unwritten "practice," in which a jury officer, rather than a judge, assumed the power to remove a grand juror. That procedure was changed as soon as the Chief Judge learned what was occurring. The Chief Judge "changed the procedures to require that [he] be consulted before imposition of any grand jury discipline." *Atherton*, 567 F.3d at 679; Pet. App. 9a. A situation comparable to Atherton's is thus unlikely to recur in D.C. Superior Court.

Likewise, this situation is unlikely to arise in the federal district courts. Federal Rule of Criminal Procedure 6(h), permits only a judge to remove a grand juror: "At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror." Federal Rule of Criminal Procedure 1(b)(2) states that "court" means "a federal judge performing functions authorized by law." The same is true in the state court systems requiring indictment by grand jury in state court criminal proceedings.[10] Petitioner

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[10] *See, e.g.*, ALASKA R. CRIM. P. 6(s) (a judge may excuse a grand juror); DEL. R. CRIM. P. 6(G) (same); FLA. STAT. ANN. § 905.01 (same); ME. R. CRIM. P. 6(j) (same); N.J. STAT. ANN. § 3:6-2 (2001) (motions challenging grand jurors "shall be tried by a judge"); N.C. GEN. STAT. § 15A-622 (2009) (a judge may discharge a sitting grand juror "upon a finding that he is

(Continued ...)

has pointed to no other court in which a "practice" such as the one previously followed in D.C. Superior Court has ever existed, and we are aware of none. Thus the situation presented here is unlikely to arise again.

In short, the unique facts of this case combined with the clear rules of the courts governing removal of a grand juror make review of this case unnecessary. On the one hand, this Court's consideration of this case would not significantly develop the jurisprudence with respect to prosecutorial immunity or provide substantial guidance to lower courts in the usual cases involving claims by criminal defendants. On the other hand, denying review in this case will neither encourage similar litigation by grand jurors nor make litigation by criminal defendants more likely.

III. THE DECISION BELOW IS IN ACCORD WITH THIS COURT'S PRECEDENTS

Finally, the petition asserts a conflict with this Court's prosecutorial immunity precedents. There is no such conflict. The D.C. Circuit properly stated and properly applied the well-established legal principles governing immunity, including the recent *Van de Kamp* decision, to the facts of this case.

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disqualified from service, incapable of performing his duties; or guilty of misconduct"); OHIO R. CRIM. P. 6(G) (court may excuse a sitting juror); R.I. SUPER. CT. R. CRIM. P. 6(g) (same); S.C. CODE ANN. § 14-7-1730 (same); TEX. CODE CRIM. PROC. ANN. ART. 19.26 (2005) (a prosecutor "shall prepare an order for the court . . . dismissing the disqualified or unavailable juror from the grand jury"); W. VA. R. CRIM. P. 6(g) (a grand juror may be excused by the court).

A. The Criteria for Determining Absolute Immunity Have Already Been Decided by This Court

As Zachem acknowledges, this Court has been "sparing in its recognition of claims to absolute official immunity." Pet. 16 (quoting *Forrester v. White*, 484 U.S. 21 9, 224 (1988)). This Court has made clear that "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley*, 509 U.S. at 273. Instead, prosecutors are shielded by absolute immunity only when they perform certain functions and when certain public policy considerations compel the grant of absolute immunity. *See, e.g., Burns*, 500 U.S. at 486-87. Here, neither Zachem's "function" of securing Atherton's removal from the grand jury, nor public policy considerations, supports the shield of absolute immunity.

To seek absolute immunity for his allegedly unconstitutional conduct, Zachem must overcome the presumption that qualified immunity is sufficient to protect him, as it is sufficient to protect almost all other government officials. *Id.* This Court has granted absolute immunity "'only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great.'" *Forrester*, 484 U.S. at 230 (quoting *Forrester v. White*, 729 F.2d 647, 660 (1986) (Posner, J., dissenting)).

To determine whether an official is entitled to absolute immunity, this Court has applied a "functional" approach. *Id.* at 224. Under this approach, courts "examine the nature of the functions with which a particular official . . . has

been lawfully entrusted, and . . . evaluate the effect that exposure to . . . liability would likely have on the appropriate exercise of those functions." *Id.* The Court has consistently emphasized that "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* at 227 (emphasis in original).

Because certain prosecutorial functions are "intimately associated with the judicial phase of the criminal process," prosecutors enjoy absolute immunity from damages liability, but only when they act "within the scope of [their] prosecutorial duties." *Imbler*, 424 U.S. at 420, 430. In *Imbler*, the Court held that prosecutors are shielded by absolute immunity for their actions as advocates for the state. *Id.* at 430, 430 n.33.

In subsequent decisions, the Court clarified that absolute immunity is mostly reserved for traditional prosecutorial functions.[11] "A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity."[12] *Buckley*, 509 U.S. at 273 (citing *Burns*, 500 U.S. at 494-96).

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[11] Indeed, Zachem recognizes in his petition, Pet. 14 (citing *Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001)), that other courts of appeals, applying these precedents, have indicated that when a prosecutor's interaction with a grand jury does not involve the traditional advocacy function of seeking an indictment, he may not be entitled to absolute immunity.

[12] Accordingly, using false testimony and suppressing exculpatory evidence, *Imbler*, 424 U.S. at 411-13, participating

(Continued ...)

Last Term, this Court addressed whether certain administrative functions of a prosecutor are shielded by absolute immunity. In *Van de Kamp*, 129 S. Ct. 855, a successful *habeas corpus* petitioner claimed that a supervising prosecutor's failure to train and supervise attorneys under his charge led to the withholding of impeachment evidence and resulted in his being deprived of a fair trial. *Id.* at 859. This Court extended absolute immunity to the administrative function at issue because it was "directly connected with the conduct of a trial." *Id.* at 862. Unlike other administrative decisions not covered by absolute immunity, "an individual prosecutor's error in the plaintiff's specific criminal trial constitute[d] an essential element of the plaintiff's claim." *Id.* The Court reasoned that a holding to the contrary would create a practical anomaly: a subordinate prosecutor who withheld impeachment evidence at trial would remain immune even when the error was committed intentionally, whereas the supervising prosecutor

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in a probable cause hearing, *Burns*, 500 U.S. at 482, preparing and filing charging documents, *Kalina*, 522 U.S. at 121-22, and presenting the evidence to a grand jury, *Buckley*, 509 U.S. at 261-64, are advocatory acts covered by absolute immunity.

On the other hand, giving legal advice to the police, *Burns*, 500 U.S. at 482, fabricating evidence by seeking a biased expert witness, making false statements at a press conference, *Buckley*, 509 U.S. at 262-64, and executing a *sworn* statement to obtain an arrest warrant, *Kalina*, 522 U.S. at 121 (emphasis added), are covered only by qualified immunity because those are prosecutorial functions that are "not within the advocate's role." *Buckley*, 509 U.S. at 278.

could be liable even for merely negligent supervision leading to the same evidence being withheld. *Id.* at 863.

B. The D.C. Circuit's Decision Is in Full Accord with the Principles Established by This Court, and Would not Merit Review in Any Event

The petition asserts that the D.C. Circuit "misapprehended" Zachem's case and "misapplied" this Court's precedents. This Court's review would not be warranted even if those assertions were correct, but they are not.

1. Misapplication of Law is Not a Ground for Review

First, as a general matter, this Court does not grant review where, as here, the petitioner's claim boils down to nothing more than an alleged misapplication of law. As Supreme Court Rule 10 states, a petition for certiorari is "rarely granted when the asserted error consists of [*inter alia*] the misapplication of a properly stated rule of law."

Here, the D.C. Circuit correctly stated, carefully analyzed, and faithfully applied the principles governing absolute immunity. *Atherton*, 567 F.3d at 682-87. The court discussed and applied the functional approach established by *Imbler* and its progeny. *Id.* Relying on this Court's precedents, including the *Van de Kamp* decision, the D.C. Circuit analyzed whether the function undertaken by Zachem with respect to Atherton's removal from the grand jury was comparable to any of the functions traditionally protected by absolute immunity. *Id.* at 686-87. The court also considered whether the public

policy concerns discussed in *Imbler* weigh in favor of absolute immunity. *Id.* at 87.

Zachem acknowledges that the court below "began correctly" in applying the functional approach to his case. Pet. 17. He argues, however, that it erred in concluding that his conduct was not protected by absolute immunity – that the court was "mistaken" about the function his actions fulfilled, and "lost sight of" facts he believes weigh in his favor. Pet. 17-19. Even if Zachem were correct (which he is not), this would, at best, amount to an error in the application of a properly stated rule of law and would not warrant further consideration by this Court.

2. The Decision Below Was Correct

Contrary to Zachem's contention, the D.C. Circuit correctly applied the precedents of this Court. In accordance with the legal principles summarized above, the D.C. Circuit's holding was compelled by essentially two fact-based determinations: (1) Zachem was performing an administrative, rather than an advocatory, function; and (2) that administrative function was not "'directly connected with the prosecutor's basic trial duties.'" *See Atherton*, 567 F.3d at 682-87 (quoting *Van de Kamp*, 129 S. Ct. at 863). Both determinations were clearly correct.

The D.C. Circuit correctly noted that the conduct at issue was not "comparable to any of the advocative functions for which prosecutors traditionally have been protected by absolute immunity." *Id.* at 686. Pet. App. 26a. Although presentation of evidence to the grand jury is within the boundaries of conduct protected by absolute immunity, Zachem was not engaged in that conduct here. *Id.* at 687. He was

called into the grand jury room only in his capacity as a supervisor to deal with a dispute between grand jurors. His actions had no bearing on presentation of evidence to the grand jury. The D.C. Circuit correctly concluded that Zachem was performing an administrative function not protected by absolute immunity.[13]

Zachem claims that the D.C. Circuit's "misapprehension of Zachem's function tainted its application of *Van de Kamp*." Pet. 22. Trying to shoehorn into the holding of *Van de Kamp*, Zachem describes his actions as being performed in "'a supervisory role of the basic grand jury advocacy duties: the presentation of the government's evidence.'" Pet. 22 (citation omitted). The D.C. Circuit, however, correctly concluded that *Van de Kamp* is inapposite. *Van de Kamp* holds that a supervising prosecutor's administrative actions are protected by absolute immunity when they are "*directly connected* with the conduct of a trial." 129 S. Ct. at 862 (emphasis added). Procuring the removal of a particular grand juror has no direct

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[13] In a footnote, the petition criticizes the D.C. Circuit's reliance on this Court's venerable decision in *Ex parte Virginia*, 100 U.S. 339 (1879), which denied absolute immunity to a county judge with respect to his task of creating a juror roll for use in future trials, on the ground that this was an administrative and not a judicial function. But the D.C. Circuit cited *Ex parte Virginia* only in support of its decision that Bailey-Jones (the jury officer) was not entitled to absolute immunity, *see Atherton*, 567 F.3d at 686-87, – an issue that is not before this Court. *Ex Parte Virginia* was not even mentioned in connection with Zachem, where the court's denial of absolute immunity was based on various other decisions of this Court.

connection to presentation of evidence to the grand jury so as to bring this case within the ambit of *Van de Kamp*.[14]

Finally, Zachem claims that the Court of Appeals in *Atherton* gave inadequate consideration to the *Imbler* factors. Pet. 23-27. To the contrary, the D.C. Circuit properly considered the *Imbler* factors, and correctly concluded that they weighed against absolute immunity here. *See* 567 F.3d at 687, Pet. App. 28a-29a.

In *Imbler*, this Court held that prosecutors are shielded by absolute immunity for their actions as advocates for the state because certain public policy concerns underlying the common-law prosecutorial immunity counsel absolute immunity under 42 U.S.C. § 1983 as well.[15] *Imbler*, 424 U.S. at 422-25.

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[14] The petition's claim that some allegations of Atherton's *pro se* complaint "acknowledge[] that Zachem's function was not limited to juror removal" does not change the fact that juror removal, at issue here, is an administrative, rather than advocatory function. All of prosecutors' actions, at some point, advance the prosecutorial office's general function of bringing criminals to justice, yet some of those actions are administrative, and, therefore, enjoy only qualified immunity pursuant to *Imbler* and its progeny, unless they fall under the narrow rule of *Van de Kamp*. Certainly no dispositive significance should be attributed to a *pro se* plaintiff's general description, in layman's terms, of prosecutorial activities. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (Allegations in *pro se* complaints are held to less stringent standards, "however inartfully pleaded.")

[15] Although Atherton's action against Zachem is brought pursuant to *Bivens*, 403 U.S. 388, rather than 42 U.S.C. § 1983, federal officials' immunities largely correspond to those of their state counterparts. *Harlow v. Fitzgerald*, 457

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Specifically, the Court focused on the constraint on prosecutorial discretion imposed by the fear of lawsuits, the potential for vexatious litigation, and the availability of alternative checks (safeguards) on the exercise of prosecutorial discretion within the criminal justice system, such as judicial oversight and professional disciplinary proceedings. *Imbler*, 424 U.S. at 424-29.

Here, the Court of Appeals specifically addressed these factors, concluding that "the activities for which he is being sued do not relate to his performance as an advocate for the government," that "Zachem did not demonstrate that 'the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect,'" and that "the absence of safeguards in this case counsels against extending absolute immunity to those involved." *Atherton*, 567 F.3d at 687; Pet. App. 28a-29a. Petitioner obviously does not agree with the Court of Appeals' assessment of these factors, but the issues were fully considered and there is no reason for further review by this Court.

In sum, this petition presents no circuit split or novel issue of jurisprudential or practical significance, but only the factbound, splitless, correct application of well-settled principles of law to an unusual situation which appears to have arisen only in the D.C. Superior Court and which, t hat court having since changed its practices, is not likely to recur.

U.S. 800, 809 (1982); *Butz v. Economou*, 438 U.S. 478, 504 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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